

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

76-4054

United States Court of Appeals

FOR THE SECOND CIRCUIT

RCA GLOBAL COMMUNICATIONS, INC.,
Petitioner,

—against—

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,
Respondents,

—and—

ITT WORLD COMMUNICATIONS INC.,
TRT TELECOMMUNICATIONS CORPORATION
and WESTERN UNION INTERNATIONAL, INC.,
Intervenors.

PETITION FOR REVIEW OF A REPORT, ORDER AND NOTICE
OF PROPOSED RULEMAKING OF THE
FEDERAL COMMUNICATIONS COMMISSION

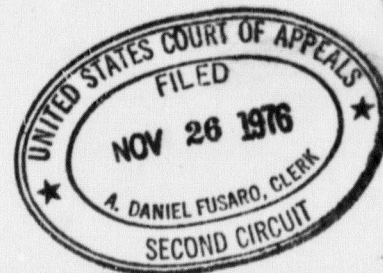
REPLY BRIEF OF PETITIONER RCA GLOBAL COMMUNICATIONS, INC.

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Petition for Review of a Report, Order
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the Federal Communications Commission

REPLY BRIEF OF PETITIONER
RCA GLOBAL COMMUNICATIONS, INC.

Petitioner RCA GLOBAL COMMUNICATIONS, INC. ("RCA Globcom") submits this brief in reply to the answering submissions of Respondent FEDERAL COMMUNICATIONS COMMISSION (the "Commission") and Intervenors ITT WORLD COMMUNICATIONS INC. ("ITT Worldcom") and TRT TELECOMMUNICATIONS CORPORATION ("TRT").

POINT I

THE COMMISSION'S "NOTICE-AND-COMMENT" PROCEDURE DID NOT PROVIDE THE "FULL HEARING" REQUIRED BY COMMUNICATIONS ACT § 222(e)(3).

RCA Globcom's principal brief demonstrates (at pp. 18-32) that Communications Act § 222(e)(3), by requiring a "full hearing" and by laying down substantive standards which depend for their application on detailed factual appraisals, entitled RCA Globcom to a trial-type hearing in the proceedings below addressed to a possible amendment of the International Formula. Section 222(e)(3) has this effect either ex proprio vigore or by serving as a "trigger", within the meaning of Administrative Procedure Act ("APA") § 4(c), 5 U.S.C. § 553(c) (1970), for the application of APA §§ 7, 8, 5 U.S.C. §§ 556, 557 (1970).

We also showed that, even if Section 222(e)(3) does not have the full reach for which we contend, the Commission abused its discretion by not providing substantially more than "notice-and-comment" procedures in the plainly adversarial context of this case. (RCA Globcom Br. pp. 32-36) Four international record carriers are at issue over the distribution of a single pool of unrouted traffic. Their positions are analagous to those of competing applicants for a broadcast station license or of other groups of discrete and mutually exclusive contestants for a given regulatory prize, who conventionally have been afforded the benefit of expansive hearing mechanisms.

A. The Procedure Employed Below

APA § 7, 5 U.S.C. § 556 (1970), provides a procedural charter for trial-type hearings. Paragraph (d) of the section authorizes an agency "to adopt" in hearings covered by the section "procedures for the submission of all or part of the evidence in written form" and, in general, to exercise the same common sense control over its proceedings, including the reception of evidence, which most tribunals enjoy.

The Order's proponents point to this portion of 5 U.S.C. § 556 and imply that it provides a warrant for the procedures employed below. (FCC Br. 28; ITT Worldcom Br. pp. 22, 29) Indeed, ITT Worldcom goes as far as to suggest that it was some kind of curtailed trial hearing in written form which actually took place below. (Id. at pp. 2, 6-7) "[T]his was not", ITT Worldcom says, "a 'notice and comment' proceeding as RCA Globcom repeatedly alleges." (Id. at p. 19 fn. 19)

This contention, we submit, is unsound. The Commission never addressed the question of the form of the evidentiary hearing which would be appropriate if, as we contend, Section 222(e)(3)'s "full hearing" requirement mandates a trial-type hearing or, at the very least, something substantially more than the barebones of APA § 4(c), 5 U.S.C. § 553(c) (1970), which provides that

"After notice required by this section,
the agency shall give interested persons

an opportunity to participate in the rule making through the submission of written data, views, or arguments with or without opportunity for oral presentation."

The Commission proceeded throughout on the assumption that, because it was engaged in rule-making, "notice-and-comment" simpliciter was enough and that that was all it was going to provide. Thus, in its original Designation Order of November 26, 1973 (43 F.C.C.2d 1174; J.A. 93), the Commission merely provided for the submission of "statements of fact and memorandums of law relative to the issues set out herein" and of responses* (43 F.C.C.2d at 1182; J.A. 101). The procedure described tracked the requirements of the Commission's Rules of Practice and Procedure for Rule Making Proceedings, 47 C.F.R. Part 1, Subpart C, §§ 1.401-27 (1975). The rules in the subpart state explicitly that they do not apply and that the mechanisms of Subparts A and B** and of APA §§ 7, 8 are to apply

* ITT Worldcom quibbles that the Commission's Designation Order requested "statements" and "memorandums", rather than "comments". (ITT Worldcom Br. p. 6) "Notice and comment" is, of course, common lawyers' shorthand for the procedure described in the portion of APA § 4(c) quoted in the text above. The fact that the Designation Order hewed somewhat more closely than does the familiar phraseology to the exact statutory language seems to us immaterial. In any case, ITT Worldcom's semantic crutch drops away under the Commission's later procedural Order of June 6, 1975 (J.A. 106-09), which referred repeatedly to the "comments" which had been theretofore filed and to the "supplemental comments" which the agency was prepared to allow.

** Subpart B, 47 C.F.R. §§ 1.201-363 (1975), entitled "Hearing Proceedings" includes topic headings, each covering a group of sections, for such matters as "Presiding Officer," "Prehearing Procedures," "Hearing and Intermediate Decision," "The Discovery and Preservation of Evidence," "Subpoenas," and "Evidence".

"When rules are required by law to be made on the record after opportunity for a Commission hearing. . . ." (47 C.F.R. § 1.417.)

In its final Report and Order of January 7, 1976 and its further Memorandum Opinion and Order of September 27, 1976, the Commission made clear that "notice and comment" was all that it had provided. (See J.A. 8 fn. 10 and J.A. 71-72.) In the words of the Memorandum of September 27:

"Section 553 of the APA, setting forth the standards for rulemaking, does not absolutely require a trial-type hearing. Instead, it provides for a notice and comment procedure of the form employed in this proceeding. . . ." (J.A. 71-72)

B. The Commission's Categorical Reliance on "Notice and Comment"

The Commission never considered what form of hearing procedure would be appropriate if something other than "notice and comment" were required by Communications Act § 222(e)(3). And, under the familiar principles of such cases as SEC v. Chenery Corp., 318 U.S. 80, 87-88 (1943) and 332 U.S. 194, 196 (1947), and Grace Line, Inc. v. FMB, 263 F.2d 709, 711 (2d Cir. 1959), the Commission's method cannot be sustained

by arguing that it might have exercised a discretion which it did not exercise to arrive at a more-or-less comparable result.

This circumstance decisively distinguishes the present case from American Tel. & Tel. Co. (High Density and Low Density Rate Structure), 45 F.C.C.2d 88 (1974), and the later Commission Orders in other AT&T rate-making cases which Commission counsel cite for the proposition that the agency

"has increasingly relied upon written proceedings in order to compile the information necessary to make determinations 'after full hearing' required under section 204."* (FCC Br. at p. 23)

In AT&T (Hi/Lo), supra, the Commission established procedural guidelines for an investigation of a proposed AT&T tariff for voice-grade private line services. And

* In RCA Globcom's principal brief we stated that, apart from Section 222(e)(3), the phrase "full hearing" is used at only one place in the Communications Act, viz., in Section 309. (RCA Globcom p. 28) By losing sight of Communications Act § 204, we committed an error which we regret. Not only were we mistaken, but, by reason of that error, we also overlooked, as we will show, a body of authority which seems rather more useful to our position than to the one now espoused by the Commission's counsel. The text of Communications Act § 204, 47 U.S.C. § 204 (1970), does not appear in the statutory appendices of either RCA Globcom's principal brief or the Commission's, and it is, accordingly, reproduced at the end of this volume.

while the Order contemplated the submission of evidence in written form, it also provided for such mechanisms as interrogatories, the participation of the Common Carrier Bureau's Trial Staff, the assignment of an Administrative Law Judge to resolve disputes over discovery, and the opportunity, during the course of the proceedings, to request cross-examination and submission of oral evidence before the Administrative Law Judge assigned (45 F.C.C.2d at 90-91).

In explaining that these devices represented a new procedural departure, the Commission expressly adverted to 5 U.S.C. § 556(d) (1970) (the trial hearing section of the APA) and noted that "the submission of evidence in writing" is permissible under that section "where a party will not be prejudiced thereby"* (Id. at 39) The Commission noted, as well, that

* The later cases cited by the Commission in its Brief at p. 23 fn. 26, viz., American Tel & Tel. Co. (WATS), 46 F.C.C.2d 81 (1974), and American Tel. & Tel. Co. (DDS), 50 F.C.C.2d 501 (1974), adopted, on the authority of AT&T (Hi/Lo), similar procedures for the agency's consideration of subsequent tariff filings by the telephone carrier with respect to some of its other services.

"our regulatory function imperatively and unavoidably requires that we issue a final decision upon close of the record without initial, recommended, or tentative decision."* (Id. at 90)

All of these terms refer to procedural devices available in the Commission's Rules of Practice and Procedure for trial hearings, see 47 C.F.R. § 1.267, which the Commission has reserved the right to waive in individual cases. None of them is mentioned in the Rules of Subpart C, 47 C.F.R. §§ 1.401-27, which apply to the general run of rule makings and which the Commission followed in the present Docket.

Whether the procedural format which the Commission adopted in AT&T (Hi/Lo) represents a proper construction of the requirements of 5 U.S.C. § 556(d) or of the "full hearing" mandate of Communications Act § 204 need not be decided here. (It satisfied, according to the Commission's brief, all of those involved in that proceeding. (FCC Br. p. 23 fn. 26)) What is significant for present purposes is the Commission's

* For later rulings in the same case, see American Tel & Tel Co. (Hi/Lo), 55 F.C.C.2d 224, 248 (1975) (Interim Decision remanding to Administrative Law Judge for further hearings because record incomplete) and 58 F.C.C. 2d 362 (1976) (Final Order). Whatever the procedural category to which this proceeding and its progeny may be assigned, it is something quite different from, and considerably more comprehensive than, the one on display when the Commission considered the International Formula in the present case.

recognition that Communications Act § 204, by calling for a "full hearing", brought 5 U.S.C. § 556 into play, that it required much more than "notice and comment", and that it demanded a careful Commission judgment about whether, how and why it should curtail the full scope of the hearing otherwise provided.

To the same effect are the decisions of the Federal Power Commission which Commission counsel cite (FCC Br. p. 23) for the FPC's supposedly similar construction, in area-wide rate-makings, of Natural Gas Act § 4(e), 15 U.S.C. § 717c(e) (1970), which, like Communications Act § 204, calls for a "full hearing" in certain tariff matters. Thus, in Area Rate Proceedings for Appalachian and Illinois Basins, 44 F.P.C. 1112 (1970), the Power Commission faced and answered a contention by the State of California that it had not supplied a "'full blown' hearing". (Id. at 1116) The Commission described the quite elaborate procedures which it had provided, and concluded that

"either Section 553 or Section 556 of the APA apply to Section 4 and 5 proceedings, and the procedure we followed satisfies both."
(Id. at 1118)

American Public Gas Ass'n v. FPC, 498 F.2d 718
(D.C. Cir. 1974), a featured authority of both the Commission

and ITT Worldcom (FCC Br. at pp. 23, 30; ITT Worldcom Br. 20, 29), involved a review of a similar rate-making proceeding with respect to the Rocky Mountain area, see Initial Rates For Future Sales of Natural Gas, 46 F.P.C. 68 (1971), in which the Commission had proceeded under Sections 4, 5, 7 and 16 of the Natural Gas Act, 15 U.S.C. §§ 717 c, d, f and o (1970). Again, the Power Commission reviewed the elaborate procedures which it had provided (see 46 F.P.C. at 72-73; 498 F.2d at 721-23)* and "found" that

"the procedure followed in this case adequately satisfies the requirements of Sections 4, 5 and 7 of the Natural Gas Act, and Sections 553 and 556 of the APA." (46 F.P.C. at 74.)

The subsequent judicial review, which sustained the procedure employed at the agency level, referred to 5 U.S.C. §§ 556, 557 only with respect to the requirements of Sections 7 and 16 of the Natural Gas Act. Neither of these provisions requires a "full hearing" with respect to the matters they cover.** The FPC cases recognize,

* These included such features as "public hearings in several locations" with "transcripts of the testimony and exhibits" and the appointment of "investigative officers empowered to receive evidence and documents deemed relevant and material". (498 F.2d at 721)

** On an application for rehearing at the agency level, the Commission had distinguished between the "full hearing" required by Section 4 of the Natural Gas Act and the lesser requirements of Section 7 of the Act, under which its action at issue was taken. 46 F.P.C. 620 (1971)

no less than AT&T (Hi/Lo), supra, that "full hearing" requires, at the very least, much more than "notice and comment" and careful attention to the question of if, how, and why the mechanisms of the required "full hearing" can properly be adjusted within the allowable limits of 5 U.S.C. § 556(d) (1970).*

None of this occurred here -- because the Commission obviously thought that it was under no statutory obligation to do so. Section 222(e)(3), the Commission ruled, required nothing more than "notice and comment". In that, we submit, the Commission was in error.

C. The Meaning of Section 222(e)(3)

We already have briefed at length our view of the meaning and significance of the term "full hearing" and the related language which appear in Communication Act § 222(e)(3). (See RCA Globcom, Br. pp. 18-32.) We would add only a few additional comments.

(1) Communications Act § 309, a section construed by the Supreme Court in United States v. Storer Broadcasting Co., 351 U.S. 192 (1956), contains another use of "full hearing"

* Area-wide rate-makings in the natural gas industry and proceedings involving significant AT&T tariffs typically serve to incarnate that spectre of the administrative process -- an auditorium-sized group of participants. No logistical problems remotely comparable arise in controversies pertaining to amendment of the International Formula.

in the Act. ITT Worldcom attempts (Brief pp. 24-28) to distinguish § 309 from § 222(e)(3) on the ground that the former includes procedural details which are lacking in the latter. The effort strikes us as wide of the mark.

Most grants or renewals of broadcast station licenses, the subject of Section 309, are not controversial in the sense that either the Commission or any one else actively resists the action. The section's procedural details are designed to regulate how a controversy over the issuance of a license can be created and to make it clear that, if, as a result, an applicant's substantial rights are at stake, he shall have a "full hearing".

Such procedural details would be superfluous here. Any proposal to change the International Formula -- whether between the IRCs and Western Union or among the IRCs inter sese -- inevitably has, if contested, the adversarial characteristics analogous to those of a competitive struggle over a station license.

Additionally, ITT Worldcom attempts (Brief p. 27) to reduce the "full hearing" requirement of former Section 309(b) (now Section 309(e)) (and by analogy the like requirement of Section 222(e)(3)) to the mere exchange of views of the

kind exemplified by the "notice and comment" procedure of this case by pointing only to that portion of the subsection regarding the parties' "participation". It ignores, however, the subsection's treatment of such matters as the burden of going forward, the burden of proof, and the introduction of evidence -- all of which strike us as elements of trial procedure which inhere in the concept of a "full hearing".*

(2) Despite ITT Worldcom's use of a single-sentence quotation from United States v. Allegheny-Ludlum Steel Corp., 406 U.S. 742, 757 (1972) (see ITT Worldcom Brief pp. 29-30), the Court did not there hold that 5 U.S.C. §§ 556, 557 need be applied only when the words "on the record" appear in the agency's governing statute. On the contrary, the sentence of the Court's opinion which follows immediately after ITT Worldcom's quotation reads:

* The Commission concedes, as it must, the breadth of the "full hearing" defined by the Court in Storer (Brief p. 14), but argues that this hearing requirement is confined to "adjudications" over particular licenses. Storer, it says, "affirms the Commission's authority to decide in broad rulemaking proceedings questions of general applicability" (Id. at 33) But that decision's recognition of the Commission's authority to set up threshold licensing requirements without a full hearing is of no significance here, where it is the rulemaking procedure for promulgating an International Formula which is itself subject to the "full hearing" requirement. Other cases on which proponents lay stress, such as Washington Utilities and Transportation Commission v. FCC, 513 F.2d 1142 (9th Cir. 1975) cert. denied, 423 U.S. 836 (1975) (see FCC Brief pp. 23-24; ITT Worldcom Brief p. 29), and American Airlines, Inc. v. CAB, 359 F.2d 624 (D.C. Cir.), cert. denied, 385 U.S. 843 (1966) (see FCC Br. pp. 16n, 13, 31n, 32; ITT Worldcom Br. pp. 22-23), are inapposite for the same reason.

"We do not suggest, that only the precise words 'on the record' in the applicable statute will suffice to make §§ 556 and 557 applicable to rulemaking proceedings" (406 U.S. at 757)

The mechanical linguistic test, which seems to fascinate the Commission (see J.A. 8, 71-72; FCC Br. p. 17), as well as ITT Worldcom, was again repudiated by the Court in United States v. Florida East Coast Ry., 410 U.S. 224, 238 (1973):

"We recognized in Allegheny-Ludlum that the actual words 'on the record' and 'after . . . hearing' used in Section 553 were not words of art, and that other statutory language having the same meaning could trigger the provisions of §§ 556 and 557 in rulemaking proceedings."*

No doubt something more is required than was present in the ICC statute construed by the Court in those two cases -- the bare word "hearing" appearing alone in a statute which had been substantively amended twenty years after enactment of the APA (cf. Florida East Coast Ry., supra, 410 U.S. at 235). But here we have stronger language ("full hearing") in a statute enacted prior to the APA, a long history of agency construction, and an adversarial framework for a dispute among a small number of parties for

* The Court also pointed out in Florida East Coast that the applicable statute is a separate source of "hearing" rights, the scope of which must be determined separately from the statute's possible effect as a "trigger" under the APA. (See 410 U.S. at 238)

which adjudicatory procedures plainly would be appropriate.*

(3) The Order's proponents cavil at the absence of legislative history. (ITT Worldcom Br. p. 24; FCC Br. p. 18) This gap would seem to impeach more their efforts to read "full hearing" and the other related language out of Section 222(e) (3) than it does RCA Globcom's demonstration that the phrase "full hearing", which the statute employs, had in 1943 (and still has**) an accepted meaning which is quite different from "notice and comment."

* It also is a distortion to suggest, as does the Commission, that,

"the Supreme Court was careful not to distinguish the Florida East Coast case [from Morgan v. United States, 304 U.S. 1 (1938)] on the ground that it involved a statute which only required a 'hearing', whereas the statute in Morgan II required a 'full hearing.'" (FCC Br. p. 25)

The Court in Florida East Coast assumed "arguendo" that the two phrases do "not differ significantly" for purposes of an argument about a procedural aspect of that case which is not in controversy here. (See 410 U.S. at 243.) The Court's "arguendo" refutes the Commission's suggested equivalence of the two phrases.

The Commission also misconceives (Brief p. 26) the distinction which the Court drew in Florida East Coast between that case and ICC v. Louisville & N.R.R., 277 U.S. 88 (1913). The Court in construing the "hearing" requirements of the Esch Car Service Act, 49 U.S.C. § 1(14) (a) (1970), viewed Florida East Coast's treatment of "nationwide incentive payments ordered to be made by all railroads" as "sufficiently different" from "[t]he type of proceeding [in Louisville] in which the Commission adjudicated a complaint by a shipper that specified rates set by a carrier were unreasonable" as to render Louisville an inapposite precedent. (410 U.S. at 244) But the delimited adversarial framework established and the substantive standards laid down by Communication Act § 222(e) (3) ("just", "reasonable", "equitable") surely are far closer to the circumstances of Louisville than they are to those of Florida East Coast.

** See, for example, Mr. Justice Douglas' instinctive reference to "a full hearing that includes the right to present oral testimony, cross-examine witnesses, and present oral arguments" in United States v. Florida East Coast Ry., 410 U.S. 224, 247 (1973) (dissent)

As Mr. Justice Frankfurter remarked in his memorable Cardozo Lecture to the Association of the Bar in 1947:

"Though we may not end with the words in construing a disputed statute, one certainly begins there. . . .

* * *

"Words of art bring their art with them. . . . And if a word is obviously transplanted from another legal source . . . it brings the old soil with it." Frankfurter, Some Reflections on the Reading of Statutes, 47 Colum.L.Rev. 527, 535, 537 (1947).

Cf. Henry v. United States, 251 U.S. 393, 395 (1920) (Holmes, J.):

"The law uses familiar legal expressions in their familiar legal sense,"

The Commission, at least, is candid enough to acknowledge that its proposed construction of Section 222(e)(3) would deprive the word "full" of any meaning at all. (FCC Br. p. 24) But it is, we submit, those who would effectively delete, by editorial blue pencil, language which appears in the United States Code who require legislative history.

(4) The Order's proponents repeatedly refer to the proceedings below as a "rule making", usually in conjunction with allusions to "broad [albeit undefined] policy issues" and "legislative" objectives, etc. (See, e.g., FCC Br. pp. 21, 25.) They seek, on this ground, to distinguish the Commission's recurrent use of trial-type

procedures to adjudicate Western Union's many "complaints" seeking to change the toll divisions for the overseas telegrams which the IRCs receive from or deliver to the domestic carrier. (See id. at pp. 19, 20.) This attempted distinction overlooks, it seems to us, that rate makings also are rule makings (see APA § 2(4), 5 U.S.C. § 551(4) (1970)), and that, in the toll division cases, the Commission was applying the same statute and amending the same statutorily prescribed formula that are at issue here. Moreover, the present dispute among the IRCs over the division of traffic bears all the adversarial attributes of a dispute over the division of tolls.*

(5) Finally, the Commission deploys one of the standard agency arguments for cutting procedural corners -- it is overworked and should not be burdened "by the importation of formalities. . . ." (FCC Br. p. 27) Surprisingly, it cites for this proposition American Airlines, Inc. v. CAB, 359 F.2d 624 (D.C. Cir.), cert. denied, 385 U.S. 843 (1966), in which the Court said:

* The Commission, while acknowledging that trial procedures were appropriate to establish the original Formula in 1943, also would distinguish that precedent "in the light of changing or new circumstances." (FCC Br. p. 18) But the only procedurally significant circumstance which is "new" is that the IRCs are more sharply at odds today than they were in 1943. This "circumstance" would seem, to us at least, to make trial procedures even more appropriate now.

"The difficulties currently experienced in the administrative process, sometimes referred to as its 'malaise,' obviously do not warrant departure from procedures mandated by Congress."* (359 F.2d at 630)

In any case, there is scant reason to believe that an Administrative Law Judge, who was reasonably intent on "moving" his calendar, would have needed any more time to put the International Formula dispute in shape for a final Commission decision on a proper record than was required to compile an inadequate record under the procedures pursued below. It need not take long, on remand, to do the job properly.

D. The Need for a Full Hearing

ITT Worldcom quotes (at Br. p. 22) Independent Bankers Ass'n v. Board of Governors, 516 F.2d 1206 (D.C. Cir. 1975), for the proposition that "an agency is not required to conduct an evidentiary hearing when it can serve absolutely no purpose" (id. at 1220). The inference, of course, is that this is such a case.

* See also CAB v. Delta Air Lines, Inc., 367 U.S. 316 (1961), where the Chief Justice wrote:

"[T]he Board is entirely a creature of Congress and the determinative question is not what the Board thinks it should do but what Congress has said it can do." (Id. at 322)

More in point here, however, is the remainder of the paragraph from which ITT Worldcom's incomplete quotation is drawn:

"The case law in this Circuit is clear that an agency is not required to conduct an evidentiary hearing when it can serve absolutely no purpose. In such a circumstance, denial of a hearing may be proper even though adjudicatory proceedings are provided for by statute. The agency, however, carries a heavy burden of justification. Where Congress has plainly given interested parties the right to a full hearing, the agency must show that the parties could gain nothing thereby, because they disputed none of the material facts upon which the agency's decision could rest."* (Ibid.)

It is incorrect to suggest, as the Commission does (FCC Br. p. 31-32), that there are no facts in "dispute upon which the agency's decision" about the shape of the International Formula "could rest".** RCA Globcom's

* Emphasis supplied here and elsewhere throughout unless otherwise indicated.

** The Commission's effort to reduce this Docket to a few cosmic principles ignores the fact that, "rule making" or not, the agency, in this Docket, is prescribing, not for a class of cases, but for a unique institutional arrangement affecting a handful of identified companies. We deal here with the classic adjudicatory function -- not the definition of general principles, but the application of principles to a specific case. This entails, we submit, a detailed factual inquiry of the kind from which the Commission mistakenly believed itself exempt because it was engaged in "rule making".

Such inquiries are particularly appropriate when, as here, the formula which the Commission undertook to change had its roots, not in "broad policies," but in a particularized process of negotiations over existing contract rights, Separate Report on International Formula, 10 F.C.C. 184 (1943), which Communications Act § 222(e)(1) undertook to honor. RCA Globcom not only gained the rights to which ITT Worldcom and TRT object, but also surrendered rights and interests to them and to others. Whether the rights so acquired were "vested" or not (ITT Worldcom Br. p. 33 n. 39) their origin says something about the way they can be destroyed.

brief sets out (at pp. 33-34) a lengthy list of such matters and develops their significance for many pages thereafter. ITT Worldcom's alternative attempt (at Brief pp. 21-22 & n.22) to dismiss these matters as irrelevant is absurd.* Every listed item is rooted in the original Designation Order as factual information the Agency deemed basic to its consideration of a restructuring of the International Formula. (J.A. 100-01)

* RCA Globcom was not alone in presenting matters of fact to the Commission. Here is a sampler of the empiric propositions which the Order's proponents pressed upon the Agency below and which scarcely could be adequately tested by conclusory commentary:

"That there has not been substantial degradations of service during the life of this formula must be attributed largely to the propensity of most carriers to place a value on customers' satisfaction and good will beyond the mere dollars and cents involved, and the expectation that this formula would soon be revised. . . ." (ITT Worldcom at J.A. 254);

"The disadvantaged carrier has, consequently, been frustrated and has recognized the futility of the expense and effort to obtain more routed traffic. . . ." (TRT at J.A. 302);

"[The] Formula necessarily reduces to some degree a carrier's motivation to provide its customers with the best possible product at the lowest reasonable charge." (ITT Worldcom at J.A. 347);

"The Formula acts as a disincentive to competition and better service. . . ." (TRT at J.A. 659);

"A reduction of competitive effort, where occurring, likely reduces quality of service to the public as well. . . ." (ITT Worldcom at J.A. 412);

"The quantitative results from the Western Union traffic study do provide illustration of the unjust, unreasonable and grossly inequitable results perpetuated by that formula." (ITT Worldcom at J.A. 561);

It also is incorrect to suggest, as ITT Worldcom does, that RCA Globcom "now [is] present[ing] [these matters] for the first time" (ITT Worldcom Br. p. 10) or that it "made a pro forma request" for a trial hearing on these matters "without offer of proof or elaboration" (id. at p. 20 n.20)* RCA Globcom addressed all of these issues below in the restricted manner which the Commission allowed. (See, e.g., J.A. 325, 397-99, 617-20 (sales solicitation expenses); J.A. 327-30 (service quality); J.A. 330-32 (rate considerations); J.A. 332-341 (public interest effects)). RCA Globcom's initial request for trial hearings, made at the inception of the proceeding (J.A. 192-93), referred to the original Designation Order, and its renewed request, following the Western Union study, was included in a 19-page statement setting out what it believed requires further exploration and why (J.A. 509-28).

It also is incorrect to say that these issues could be properly developed on paper. It is not a question,

* Indeed, the Commission denied RCA Globcom's request for an evidentiary hearing not for any claimed lack of specificity, but rather on the erroneous basis that, in a jurisdictional sense, a paper rulemaking limited to notice and comment was all that was required, (J.A. 8 fn. 10; J.A. 71-72).

as ITT Worldcom would have it, of "credibility" (ITT Worldcom Br. 21) or, as the Commission would have it, of mere "inference" and "deduction" (FCC Br. p. 31), but of exposition and tested analysis sufficient to ground a decision in an adversarial context, see Mobil Oil Corp. v. FPC, 483 F.2d 1238, 1260 (D.C. Cir. 1973) (quoted in RCA Globcom Br. at pp. 34-35). See also Citizens for Allegan County, Inc. v. FPC, 414 F.2d 1125, 1129 (D.C. Cir. 1969).

The Commission's treatment of the increased solicitation costs likely to result from the new formula (see RCA Globcom Br. pp. 17, 47) -- a major "public interest" consideration -- illustrates the inadequacy of the Agency's method. Its Memorandum Opinion of September 27 disclaims a preference for "wasteful orgies of spending" and asserts that "[n]othing in our Report and Order indicates a desire for such a result. . . ." (J.A. 77) But it does not explain why the Western Union study or one-sided "comments" adequately illuminate the likely consequences of its Order in the market place.*

* The Commission seems to acknowledge, at least in its Opinion of September 27, that there will be some effect of the kind which RCA Globcom foresees (and which the Commission foresaw when, to avoid such a result, it promulgated the original formula). (See J.A. 77.) But this perception demonstrates, not that the phenomenon is irrelevant, but that it requires a quantification through evidence so that it can be weighed against the ostensible (and debated) service benefits which, it is said, may flow from the formula change.

In a final effort to avoid the hearing to which RCA Globcom was entitled, ITT Worldcom says that RCA Globcom did not ask for a trial-type hearing or somehow "waived" its right to such a hearing. (Br. at p. 20 n.20). Similarly, the Commission suggests that RCA Globcom "should not now be heard" to challenge the procedures employed below. (FCC Br. at p. 21) This ostensible "waiver" is premised upon RCA Globcom's agreement in August, 1974 not to press immediately for its previously requested full oral evidentiary hearing, pending the completion of the Western Union study. Subsequently, RCA Globcom, after having an opportunity to evaluate the study and the comments thereon, clearly reiterated its assertion of its right to a full hearing (J.A. 528).

The suggestion that RCA Globcom waived its right to a full hearing is, in any case, answered by a reference to the Commission's Report of January 7, 1976 and its further Memorandum Opinion of September 27, 1976. The Commission had no doubt about either the kind of hearing RCA Globcom had wanted or about the procedural propriety of its request. The agency simply denied the request on the basis of its

erroneous belief that "notice and comment" met the requirements of Section 222(e)(3). (J.A. 7 fn. 10, J.A. 71-72)

The waiver theory is clearly a post hoc attempt by Commission counsel and ITT worldcom to justify an agency action on grounds other than those relied upon by the agency itself, a practice consistently rejected by the courts.* See, e.g., SEC v. Chenery Corp., 318 U.S. 80, 87 (1943); Texas Gas Transmission Corp. v. Shell Oil Co., 363 U.S. 263, 270 (1960); Grace Line, Inc. v. FMB, 263 F.2d 709, 711 (2d Cir. 1959); National Electrical Mfg. Ass'n v. United States, 407 F.Supp. 598, 603 (W.D. Pa. 1976).

RCA Globcom, while striving to do the best it could within the procedural framework provided by the Commission, preserved its claim to trial procedures throughout (J.A. 192-93, 336, 528) -- a claim which, we submit, was (and is) well-founded in law and in the circumstances of this case.

* ITT Worldcom did not present a "waiver" argument (J.A. 725-26) when the trial-hearing issue was before the Commission on the various applications of this past spring which eventuated in the Memorandum Opinion of September 27.

POINT II

THE COMMISSION'S FINDINGS
DO NOT SUPPORT ITS ORDER

A. The Commission's Failure to
Make the Statutory Findings

It is undisputed that, in the Order of January 7 and in the Supplemental Order of September 27 which are here for review, the Commission did not, in terms, find that its new formula "will be just, reasonable, equitable, and in the public interest."* (See RCA Globcom Br. pp. 46-50.) The Order's proponents urge, of course, that the agency's Report contains, by implication, the findings demanded by Communications Act § 222(e) (3). (See FCC Br. pp. 34-37; ITT Worldcom p. 36.)

* The Commission in the past has made findings in statutory terms in prior Orders prescribing or amending the International Formula. See e.g., Separate Report of the Commission on Formulas for the Distribution of International Traffic, 10 F.C.C. 184, 197 (1943); Western Union Tel. Co., 25 F.C.C. 535, 640 (1958). On occasion, the Commission struggled with the question of whether it could make findings in such form. Western Union Divestment, 30 F.C.C. 323, 371-72, 382 (1961).

After RCA Globcom had pointed out in four briefs to this Court (including briefs filed on its stay motion) the deficiency in the present Orders, Commission counsel now point (FCC Br. p. 34 n. 36) to a ministerial Order issued by the Commission on November 9 which seeks, in passing, to make the required findings nunc pro tunc (id. at Addendum A-6). This boot-strapping exercise demonstrates that the findings were not made in the operative Orders under review. Nor could they plausibly have been made since the very Order prescribing the present formula also commissioned proceedings looking towards a possible further change to the all-routed concept. The latter step would seem to require finding(s) contrary to at least some of those needed for the present prescription.

The references cited for this proposition are, it seems clear to us, largely addressed, not to the formula the Commission adopted, but to the Commission's denunciation of the prior formula and to the speculative virtues of the all-routed concept which, the Commission recognizes, requires further study (J.A. 28, 35-36).

B. Insufficiency of the Conclusions
Supporting the Interim Formula

RCA Globcom's principal brief demonstrates (at 47-50) that the Commission's prescription of the interim formula rested on its unanalyzed preference for an ultimate regime of all-routed traffic and its unexplained conclusion that a linkage of routed and unrouted traffic will serve as a stimulus to improved service. (See J.A. 27)

The Commission, in response, adverts to the latter conclusion as evidence that it made factual determinations required for a formula prescription. (See, e.g., FCC Br. p. 38.) But neither the Commission in its opinions nor its counsel in this Court does more than assert that the new formula will stimulate service improvements, presumably through competition. They do not show what hypothesized improvements were considered, or even identified below, or that service under the present formula is other than of the highest quality.

Commission counsel grudgingly concede that the agency was "unable to predict . . . the exact nature of the service improvements it hopes to stimulate." (Br. p. 40) Indeed, it has not identified any of the improvements for which it "hopes" in even the most general terms or found that any such improvements are realistically to be expected.

The mere "possibility" (J.A. 17) that some unidentified benefit may accrue from competition is not enough. Indeed, Pocket Phone Broadcast Service, Inc. v. FCC, 538 F.2d 447 (D.C. Cir. 1976), upon which the Commission relies (Br. p. 41), highlights the Commission's failure to explain the "public benefit" it presumes will be achieved. There, the Court pointed out that the Commission had "carefully explain[ed] . . . the unmet need for additional one-way signalling units" when it allowed entry of New York Telephone into the field. (538 F.2d at 451) No comparable explanation has been provided by the Commission here. Nor has the Commission presented

"ground for reasonable expectation that competition may have some beneficial effect. Merely to assume that competition is bound to be of advantage, in an industry so regulated and so largely closed as this one, is not enough." FCC v. RCA Communications, Inc., 346 U.S. 86, 97 (1953).

Under these standards, it is clear that the Commission has failed to bring to bear on the required "public

interest" component of its prescription Order* a consideration, or even an identification, of the results sought to be achieved.

Further, even if the vindication of Commission preference for undifferentiated competition is a proper goal of the interim formula, it would appear that the new formula's operation may produce a result, in practice, which is far from the Commission's apparent intent. As demonstrated in the principal brief of Intervenor Western Union International (Br. pp. 17-18) and as argued by ITT Worldcom (Br. p. 39), the "bonus" feature of the interim formula could lead an IRC to seek to increase its share of "unrouted" traffic, not by pursuing the occasional "hinterland" customer who does not now "route", but by intensifying its solicitation efforts to change the "routings" of large institutions in the "gateways" and other metropolitan centers which already "route".

* It is perhaps an appreciation of the deficiencies of its "public interest" analysis which leads the Commission also to suggest (FCC Br. p. 42) that considerations of equitable traffic distribution alone will suffice to sustain the new formula. But even if one assumes that the Commission's decision were governed solely by equitable considerations, a notion which the Report rebuts, the Commission would be in error. Section 222(e) (3) does not use the disjunctive "or" in delineating the prerequisite for prescription of a new formula, but rather requires that it be "just, reasonable, equitable and in the public interest."

We doubt that the Commission would view this development as consistent with its expressed desire to promote "consumer choice" and thus to achieve "a consequential reduction in unrouted traffic." (J.A. 35) But, in any case, it is plain that the Commission never focused on this likely consequence of its Order.*

C. Insufficiency of the Conclusions
Repudiating the Original Formula

In its principal brief, RCA Globcom pointed out that the Commission failed adequately to explain how the "market sharing" features of the original formula and accrued "overages" and "deficiencies" (which the Commission views as "distortions" (J.A. 3)), are contrary to the public interest or to the rights of the IRCs inter sese. (Br. p. 45) The discussion need not be repeated here.

* ITT Worldcom on this appeal argues for the first time that the interim formula may result in lower rates to customers. (ITT Br. at 38, 39) In our principal submission, we pointed out that the Commission did not properly consider evidence that the formula change will increase the industry's solicitation costs and, ultimately, its charges to customers (Br. at 33-34), a proposition which ITT Worldcom does not choose directly to address.

The Commission does not, in any case, rest its decision below, or its argument here, on any suggestion that the formula change will serve to reduce rates as a result of competitive price-cutting. Nor did ITT Worldcom advance this position at the agency level where it said:

"This position completely ignores the fact that this is a competitive market and that, as a competitive necessity, all carriers will match the lowest rates in the market." (ITT Worldcom at J.A. 416)

In their response, the Order's proponents have, in essence, done no more than simply repeat the conclusions of the Commission. They argue that it is somehow self-evident that the old formula operated inequitably because changed circumstances have caused unrouted traffic to be allocated unexpectedly and that the overages and deficiencies, which have resulted from the expansion of the international telegraph operations of the IRCs, are by their nature inequitable and contrary to the public interest by serving as a disincentive to competition. The first of these claims has yet to be explained. And even the limited record which the Commission permitted to be made below indicates that proponents' latter claim is not well taken.

1. The Purposes of the Original Formula

No party disputes that a purpose of the original formula was to provide relative stability of the proportional market shares of total traffic (routed and unrouted) of each of the IRCs at the time of the WU-Postal merger. But as the Commission's Separate Report on the International Formula, 10 F.C.C. 184 (1943) makes clear, this feature, however, was employed to accomplish more fundamental purposes; viz. (1) to prevent favoritism by the merged domestic carrier towards its own international cable division pending the latter's divestiture (10 F.C.C. at 185) and to prevent the monopoly domestic carrier from discriminating

in favor of a particular IRC (10 F.C.C. at 184);* (2) to discourage wasteful spending in efforts to divert customers of other IRCs (10 F.C.C. at 191); (3) to reflect the agreement among the carriers contemplated by statute (10 F.C.C. at 195); (4) to "resolve the conflicting equities of the various carriers"** (ibid.) ; and, (5) presumably, as required by statute, to preserve then "existing contractual rights of the carriers" insofar as consistent with the public interest (§ 222(e)(1)).

When the focus of inquiry is directed to these enumerated purposes, as it properly should be, it is clear that no facts were adduced below which in any way indicate that these purposes were not fulfilled by the original formula -- either in concept or operation.

It is, of course, a simple truism that the original formula did not provide for the allocation of unrouted traffic in proportion to the respective IRC's routed traffic.

* See also Western Union Divestment, 30 F.C.C. 323 (1961), in which the Commission recognized that this problem would remain, and would require perpetuation of the International Formula, after the divestment of Western Union's cable division to WUI.

** Indeed, Section 222(e)(1), by requiring a formula, effectively deprived those carriers which enjoyed a superior market position and bargaining advantage in 1942 from further developing that competitive advantage. The formula seeks, and in large measure has achieved, an accommodation between allocation and free competition by designating 1942 market shares as the fulcrum for the balance between competitively obtained routings and allocated unrouted traffic.

But it is equally obvious that the absence of such a component from the original formula does not per se demonstrate that the purposes of the original formula were not fulfilled.

2. The Effect of "Overages" and "Deficiencies"

The Commission concluded below that "the original formula provided no incentives for the IRC's [sic] to improve service or increase efficiency" (J.A. 74) In the proceedings below, however, no IRC demonstrated or even claimed that because of the formula, either in concept or effect, it or any other IRC was actually discouraged from making service improvements or that absent the formula, any IRC would or could have undertaken steps to improve service or increase efficiency which the original formula ostensibly discouraged. In reaching its conclusion, the Commission, we submit, has indulged in an assumption which, as shown in our principal brief, is not only intuitively implausible, but also not grounded in any facts of record.

Indeed, even if one were to assume that the notion of "competition", in the abstract, is a proper element in the formula calculus (which, we submit, it is not), the Order's proponents have not demonstrated that the accumulation of overages and deficiencies has, in any way, hindered the

expansion (or any other aspect of the operations) of the international telegraph operations of TRT and ITT Worldcom or anyone else.*

Moreover, the accumulation of "overages" and "deficiencies" does not appear to have fostered disincentives in improved service or to have diminished the competition for routings, considerations which the Order's proponents view as proper elements of the evaluation calculus for any formula promulgated. Thus, under the original formula an IRC with accumulated "overage" to a particular destination would appear to have had whatever incentive any formula can provide to compete for additional routings. A carrier in this condition could keep any additional routings it obtained without offsetting loss of any unrouted traffic. Similarly, an IRC with an accumulated deficiency would not be discouraged from competing for additional routings. It is more advantageous to receive revenue-producing routings than non-revenue producing bookkeeping entries attesting to a larger "deficiency" in a shrinking pool of unrouted traffic. Finally, there would appear to be no disincentive for any IRC to compete for routings to the point where no unrouted messages would remain for distribution to competitors.

* TRT's brief, which is largely a celebration of its own recent route extensions beyond Latin America, does not presume to suggest that its adoption of this expansive course was in any way influenced, let alone impeded, by the existence of the prior formula. And TRT's experience simply replicates that of the other IRCs, all of which extensively expanded the scope of their overseas services, including telegram services, during the incumbency of the prior formula. ITT Worldcom does not indicate either (a) that RCA Globcom and WUL are not effective competitors to countries for which ITT Worldcom received all unrouted traffic under the prior formula, or (b) that ITT Worldcom was itself inhibited from competing effectively to destinations where by reason of "overages" and "deficiencies", another of the IRCs received all of the unrouted traffic distributed pursuant to the prior formula. Beyond the oft-reiterated copybook maxims about competition in the abstract, the Order's proponents offer nothing.

The Commission thus has not only failed to support with substantial evidence such subsidiary findings as it has purported to offer as grounds for its decretal Order, but it also has proceeded upon faulty assumptions about an incorrect analyses concerning such "facts" as it considered. These defects render its ultimate findings arbitrary and capricious. Its repudiation of the established formula should not be sustained.

CONCLUSION

The Commission's Report, Order and Notice of Proposed Rulemaking, insofar as appealed from, should be vacated and set aside and the case remanded to the Commission for such further proceedings as may be appropriate.

Respectfully submitted,

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November 26, 1976

SUPPLEMENTARY STATUTORY APPENDIX

SUPPLEMENTARY STATUTORY APPENDIX

Communications Act of 1934
Section 204, 47 U.S.C. § 204

"§ 204. Hearings on new charges; suspension pending hearing; refunds.

"Whenever there is filed with the Commission any new charge, classification, regulation, or practice, the Commission may either upon complaint or upon its own initiative without complaint, upon reasonable notice, enter upon a hearing concerning the lawfulness thereof; and pending such hearing and the decision thereon the Commission, upon delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such charge, classification, regulation, or practice, but not for a longer period than three months beyond the time when it would otherwise go into effect; and after full hearing the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of the suspension, the proposed change of charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased charge, the Commission may by order require the interested carrier or carriers to keep accurate account of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased charges as by its decision shall be found not justified. At any hearing involving a charge increased, or sought to be increased, after the organization of the Commission, the burden of proof to show that the increased charge, or proposed increased charge, is just and reasonable shall be upon the carrier, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible."

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

----- x
RCA GLOBAL COMMUNICATIONS, INC., :
Petitioner, : AFFIDAVIT OF SERVICE
-against- :
FEDERAL COMMUNICATIONS COMMISSION :
AND UNITED STATES OF AMERICA, :
Respondent. :
----- x

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

ABDUL R. AHMAD, being duly sworn, deposes and says:

1. I am over the age of 18 years and not a party to
this action.

2. On the 26th day of November, 1976, I served two (2)
copies of RCA's reply brief upon each of the following:

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by depositing true and correct copies thereof, postage pre-paid,
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of said attorneys at the addresses listed above.

Abdul R. Ahmad

Abdul R. Ahmad

Sworn to before me this

26th day of November, 1976

Robert R. Cawthra, Jr.
Notary Public

ROBERT R. CAWTHRA, JR.
Notary Public, State of New York
No. 31-0605710
Qualified in New York County
Commission Expires March 30, 1977

